SUPREME COURT, U. S.

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In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1442

DONALD M. PETERSON,

Petitioner,

v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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This supplemental brief is Petitioner's response to arguments first raised in Respondent's brief responding to petition for certiorari.

1. For the first time in this case Respondents' Brief mentions the degrees as to burden of proof, as to criminal and civil cases, which has no application here in these companion cases. The basic facts are the same (Respondents' Brief in Case No. 74-1360, p. 2), and here in the instant case "scienter" is an essen-

tial element to fining Petitioner. The real effect of the second trial here is to supply additional evidence showing Petitioner (Dr. Peterson) was not associated with the wrongful act, namely, the filing of false claims.

The real injustice here arises from inconsistent factual conclusions, and thus conflicting results, arrived at by lower courts based on the same factual events. In the first appellate court decision, *U. S. v. Peterson* (CA 5, 1974) the court absolved Petitioner, after finding he was not associated with the wrongful act of conspiring to make a false statement, Exhibit C of Petition. In the instant case, however, *Peterson v. Weinberger* (CA 5, 1975) (Petitioner Ex. B) the Petitioner is fined for making false claims, though the appellate court fails to clearly conclude that "scienter" existed as to the Petitioner.

The conclusion was arrived at in the first decision that Dr. Peterson was not associated with making the claims, either as a participant or a co-conspirator. Such conclusion was based on a material fact, the very method used in preparing the claims, marking out Dr. Peterson's office address and inserting in lieu thereof the Irving, Texas post office box of the principal, James Peterson. Such a scheme indicates an intention to exclude therefrom the Petitioner. In the second case there is evidence establishing that Petitioner had no "scienter" of the filing of false claims, as he learned of the wrongful act some four weeks thereafter upon receipt of checks (Petition, 10).

Thus, the issue here is not one of burden of proof, as suggested by Respondents. But instead, it involves a selection of the proper factual evaluation. While one factual conclusion is

logical, (see explanation and conclusion in the appellate decision in the criminal case, Petition Ex. C), the conclusion here is inconsistent with the basic facts (see the incomplete, confusing analysis in the appellate court opinion, Petition Ex. B). Respondents' new contention is contrary to the record, and this is apparent from reading the record or opinions.

It is respectfully submitted to the Court, and is believed by Petitioner's counsel, that the inconsistent appellate court decision may be attributed to ulterior motives influencing this second decision of the court, resulting from certain actions of Petitioner's counsel. It is unjust to penalize Petitioner for any indiscretion of his counsel.

And as to joint and several liability and collection of judgment, the Dallas attorney for Justice has clearly advised Petitioner's counsel that enforcement will definitely be made first against Petitioner, at least for $85,000. Though according to court opinions Petitioner is neither principal, participant or conspirator in the wrongful act of filing false claims; nevertheless the collection is to be made from Petitioner, not the one principal and only beneficiary of this scheme, James Peterson, a person separate from Petitioner.

2. Respondents' brief for the first time proposes (Brief, 4), wrongfully, that the appellate court (CA 5) here follows its prior decisions *(U. S. v. Aerodex,* (CA 5, 1973) 469 F2d 1003 and *U. S. v. Priola* (CA 5, 1959) 272 F2d 589), which require "scienter" as an essential element of guilt under the False Claims Act. Like the *Priola* case, as to Petitioner no "scienter" was proven here, but contrary to *Priola* the Petitioner is fined here.

While "scienter" existed here (Petition Ex. B, pp. 15-17 of court opinion), its existence was found only as to the principal, James Peterson, and not the Petitioner.

Admittedly Petitioner was in no way associated with the filing of false claims (the wrongful act), as stated in the various opinions of the lower courts, particularly the appellate criminal case opinion (Petition, Ex. C). Rather, the evidence shows Petitioner knew not of the act of filing. Petitioner's only act was a separate act — writing of a check — on a date four weeks after the wrongful act. Thus, Petitioner is being fined, though as to him "scienter" of the wrongful act was not proven. This result is contrary to all earlier decisions of this circuit (CA 5).

It is error for the appellate court not to explain or justify in its opinion (Petition Ex. B) its inconsistency in not following its earlier decisions in *Aerodex* and *Priola* (Petition Issue No. 6, pp 5 & 6 and 38 & 39).

The Court should not be deceived by Respondents' erroneous evaluation of these decisions.

3. Respondents' assertion (Brief, 6.) of a "full factual record" is an irresponsible half-truth, designed to deceive the Court. In part, such a record exists, namely, as to any evidence desired to be submitted by the government and Third Party Defendant, but it is false as to Petitioner's defense in the False Claims Act case and the issues in the Plaintiff's case (Petition, 41-42).

4. Evaluating for the first time recent Supreme Court decisions, Respondents assert (Brief, 6.) that the lower court results here follow "prior decisions articulating the scope of official

immunity" and then proceed to misinterpret these decisions. The cited *Barr* case has either been reversed by subsequent cass or else limited in scope to government executives (Petition 48-52) whereas defendants here are (1) field investigators of HEW exercising illegally judicial and police powers in ordering the sanctions themselves, and (2) insurance companies acting wrongfully in obeying illegal instructions. The lower court here, like in the *Rhodes* case, erred in dismissing the tort actions without each defendant being required to prove up his personal defense. Defendants herein elected at the trial not to introduce any evidence as to their personal defenses. The appellate court decision (Petition Ex. B) placed the burden of proof, as to the defendants' personal defenses, upon Petitioner-Plaintiff.

Contrary to Respondents' evaluation, the Supreme Court decisions, such as *Bivens, Rhodes* and *Strickland,* have served to limit the scope of immunity for government employees. The lower courts should be required to follow these recent decisions. The *Barr* case, cited and relied on by the lower courts, is not controlling here, and the lower court decision should be reversed.

It is respectfully submitted that this Petition for Writ of Certiorari should be granted, the False Claims Act issues here are more significant than those in *U. S. v. Bornstein,* No. 74-712.

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